UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

FRASER FELTNER,
KIMBERLY FELTNER,
plaintiffs

v. C.A. No. 98-410-T

THE STOP & SHOP SUPERMARKET COMPANY,
defendant

v.

DISILVA TRANSPORTATION, INC., and
LIBERTY MUTUAL INS. CO.,
third party defendants

Memorandum of Decision

ERNEST C. TORRES, Chief United States District Judge.

This case involves an insurance coverage dispute that has been submitted for decision upon an agreed-upon statement of facts.

Facts

The facts, as stipulated to by the parties, are as follows. Stop & Shop operates a chain of supermarkets. In 1985, Stop & Shop contracted with DiSilva Transportation, Inc. ("DiSilva") to have DiSilva deliver dairy products from Stop & Shop's warehouse to various Stop & Shop supermarkets. The parties renewed and updated the contract in 1993. The 1993 contract required DiSilva to indemnify Stop & Shop for any "loss, damage, liability or expense

resulting from any injury or damage, or any claim of injury or damage to any person or the property of third parties in the course of or in conjunction with the acceptance, transportation or delivery of commodities and property", and to obtain appropriate insurance to assure the performance of its obligations under the contract.

DiSilva purchased a Truckers Coverage insurance policy from Liberty Mutual Insurance Co. ("Liberty"). That policy provided coverage for liability arising out of the conduct of DiSilva's trucking business and it named Stop & Shop as an "additional insured."

Fraser Feltner is an independent truck driver who was engaged by DiSilva to make deliveries to Stop & Shop. On January 11, 1997, Feltner was making a delivery to a Stop & Shop supermarket in Darien, CT. Because access to the loading dock was blocked by a parked trailer, Feltner left his truck, climbed onto the loading dock, and entered the supermarket through the back door in an effort to find someone who could arrange to move the trailer. As Feltner entered the building, a rug that was being moved by a Stop & Shop employee fell on him.

Feltner sued Stop & Shop for the injuries that he allegedly sustained. Stop & Shop, in turn, filed third-party complaints seeking indemnification from DiSilva pursuant to the 1993 contract and from Liberty pursuant to DiSilva's policy, which named Stop &

Shop as an additional insured.

Feltner's claim against Stop & Shop was settled for $185,000 in cash plus the first $30,000 of any amount that Stop & Shop may recover from Liberty. Since DiSilva contributed $75,000 toward the settlement, Stop & Shop also agreed to dismiss its third-party claim against DiSilva. Consequently, all that remains to be resolved are Stop & Shop's claims against Liberty for indemnification under the policy issued to DiSilva and for an alleged violation of Mass. Gen. Laws ch. 93A by unjustifiably denying coverage and refusing to provide Stop & Shop with a defense.

Discussion

Stop & Shop argues it is entitled to indemnification from Liberty because the policy issued to DiSilva covers Feltner's claim, and Stop & Shop is an additional insured under that policy. In addition, Stop & Shop argues that, even if the policy doesn't cover Feltner's claim directly, the indemnification provision contained in the 1993 contract does cover Feltner's claim, and that contract is an "insured contract" under DiSilva's policy.

I. Policy Coverage

DiSilva's policy requires Liberty to "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of

a covered 'auto.'" The term "accident" is defined as "an unexpected, unintended event that causes bodily injury arising out of the ownership, maintenance or use, including the loading or unloading of an auto."

It is undisputed that Feltner's truck was a "covered auto." What is disputed is whether Feltner's injury arose out of the "use" of that truck; or, more specifically, whether that injury arose out of the "unloading" of Feltner's truck.

The parties have stipulated that Massachusetts law applies because that is where the policy was issued. In construing insurance policies that provide coverage for injuries occurring while a motor vehicle is being loaded or unloaded, Massachusetts adheres to the "complete operation" rule. August A. Busch & Co. v. Liberty Mutual Insurance Co., 158 N.E.2d 351, 353-54 (Mass. 1959). That rule defines unloading as "a continuous transaction ending with the deposit of the goods in the hands of the purchaser." Id. at 354. The process is not deemed to be completed until the goods have been removed from the vehicle and delivered into the possession of the purchaser. Id. (unloading of beer from truck not complete where the cartons of beer had been removed from truck, carried fifty-five feet down alley, and slid down chute into the cellar of a restaurant, because they still were in the process of being placed into purchaser's ice chest).

Unloading also includes "doing something reasonably connected

with the process" of loading or unloading. Travelers Ins. Co v. Aetna Life and Casualty Co., 571 N.E.2d 1383, 1385 (Mass. 1991), quoting F.W. Woolworth Co. v. Lumbermens Mutual Ins. Co., 243 N.E.2d 919, 919 (Mass. 1969). In Travelers, it was held that an insured in the business of transporting elderly and handicapped persons who was carrying a passenger from her apartment to a "chair van" was in the process of "loading" the van even though the injury in question occurred when a wheelchair in which the passenger was being transported overturned on the porch of the apartment building. 571 N.E.2d at 1385.

In this case, Feltner clearly was "doing something reasonably connected with the process" of unloading his truck. He was entering an area in the supermarket adjacent to the loading dock for the purpose of locating someone who could arrange to move the trailer that was blocking his access and preventing him from unloading.

Liberty argues that, even if Feltner was injured while he was unloading his truck, Stop & Shop is not covered by DiSilva's policy because Stop & Shop's liability is predicated on the alleged negligence of its employee, who was not engaged in the unloading activity. Put another way, Liberty contends that, in vicarious liability cases, it's the conduct of the tortfeasor, not the conduct of the victim, that determines whether coverage exists.

In the abstract, that argument has some appeal. A convincing

case can be made that coverage for liability arising out of the unloading of an insured's vehicle should extend only to situations in which the insured or its employee was engaged in the unloading activity. However, coverage questions do not turn on abstract argument. Rather, they turn on the provisions of the particular policy at issue.

In this case, DiSilva's policy affords coverage for liability incurred by Stop & Shop arising out of the use (i.e. the unloading) of an insured vehicle. The policy does not limit Stop & Shop's coverage to liability arising out of its use of an insured vehicle. If Liberty wished to limit coverage in that way, it easily could have done so. Since Liberty did not do so, the policy must be construed as written; and, as written, it covers any liability of Stop & Shop arising out of the unloading of Feltner's truck without regard to whether or not the injury was inflicted by someone participating in the unloading.

Liberty's argument that the policy is ambiguous and should be construed to afford coverage only when Stop & Shop employees participated in the unloading activity fails because even if the policy is considered to be ambiguous, any ambiguity must be construed against Liberty as the party that drafted the policy. Falmouth National Bank v. Ticor Title Insur. Co., 920 F.2d 1058, 1061 (1st Cir. 1990) ("When considering an insurance policy in its entirety, the general rule is that any ambiguity should be

construed against the insurer as it is the insurer who supplies the contract."); see DeMoulas v. DeMoulas Super Markets, Inc., 677 N.E.2d 159, 203 n.72 (Mass. 1997) ("Ambiguous language in an agreement is to be construed against the drafter of the agreement.").

In short, because Feltner's injuries, and Stop & Shop's potential liability for those injuries, arose out of the use of a covered vehicle, Liberty's policy affords coverage to Stop & Shop as an additional insured. Accordingly, there is no need to address Stop & Shop's alternative argument that it is entitled to indemnification on the ground that the 1993 contract under which DiSilva agreed to indemnify Stop & Shop is an insured contract.[1]

II. Chapter 93A Claims

In its complaint, Stop & Shop asserts a claim for what it alleges was a violation of Mass. Gen. Laws ch. 93A, which creates a cause of action for victims of unfair and deceptive acts or practices. Specifically, Stop & Shop alleges that Liberty violated ch. 176D, § (9)(f), which defines unfair and deceptive acts or

[1]The policy issued to DiSilva excludes from coverage "liability assumed under any contract or agreement." However, it further provides that "this exclusion does not apply to liability" that is assumed in an "insured contract," which is defined as a contract "pertaining to [the insured's] business under which [the insured] assume[s] the tort liability of another to pay for bodily injury or property damage to a third party." Stop & Shop's argument that the policy affords coverage simply because its agreement with DiSilva is an insured contract misses the mark. The fact that liability assumed under an "insured contract" is not automatically excluded from coverage does not necessarily mean that it is covered. In order to be covered, it must fall within the coverage provisions of the policy which, in this case, it does.

practices in the business of insurance to include "failing to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear."

This claim is without merit. Whether DiSilva's policy afforded coverage to torts committed by a Stop & Shop employee who was not using a covered auto was a fairly debatable question. The mere fact that the Court, now, has determined that there was coverage is not sufficient to establish that Liberty's obligation to defend and indemnify was reasonably clear at the time that Liberty denied coverage. Therefore, Liberty is not liable for attorneys' fees or punitive damages under the routinely invoked but seldom applicable provisions of chapter 93A.

Conclusion

For all of the foregoing reasons, judgment may enter for Stop & Shop with respect to its breach of contract claim in the amount of $140,000, which represents Stop & Shop's liability to Feltner in the amount of $215,000 less the $75,000 indemnification payment made by DiSilva.[2] In addition, Stop & Shop is awarded the reasonable costs and attorneys' fees incurred as a result of Liberty's failure to defend Feltner's suit against Stop & Shop. Since the parties have requested an opportunity to settle that portion of Stop & Shop's claim, the Court will allow Stop & Shop

[2]Since DiSilva has not asserted any cross-claim for indemnity against Liberty, any such claim would have to be the subject of a separate action.

until April 21, 2001 to file either a stipulation setting forth that amount or a properly-documented and supported motion for attorneys' fees. Failure to do either by that date shall constitute a waiver of Stop & Shop's claim for attorneys' fees and costs.

Judgment shall enter dismissing all of the remaining claims.

IT IS SO ORDERED,

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Ernest C. Torres
Chief United States District Judge

Date: March , 2001